IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.731 OF 2005

Shri Madhukar Ramchandra Pawar .. ..Appellant

Versus

Shri Vithal Balkrishna Shikare & Anr. ..Respondents

Mr.A.Y.Sakhare with Mr.Dilip Taur for appellant

Mr.R.V.More for respondents

CORAM : P.V.KAKADE, J.

DATE : 10TH AUGUST, 2005.

P.C.:

1. The appellant has preferred this appeal against the judgment and order passed by Addl. District Judge, Karad dated 15.2.2005 dismissing the appeal and confirming the judgment and order passed by Civil Judge, Junior Division, Karad dated 12.8.1997 partly decreeing the suit of the plaintiffs issuing perpetual injunction against the appellant-defendant so far as property S.No.809-A/2 was concerned, however, relief for

perpetual injunction in respect of remaining suit property described in plaint para 1-B was rejected.

2. I have heard the learned counsel for both the parties. Perused the record.

3. The plaintiffs had filed the suit for perpetual injunction restraining the defendant from interfering the possession of the plaintiff regarding two suit lands and alternatively for possession of the suit land described in plaint para 1-B. The subject matter of the suit was Survey No.809-A/2 and property as described in para 1-B of the plaint. The case of the plaintiffs is that they are the owners of the survey No.809-A/2 and defendant was obstructing their possession in the said property, besides, other property involved. The defendant challenged the suit on the ground that the plaintiffs' allegations were not correct and hence the suit was sought to be dismissed on the ground that the defendant was in possession of the said suit property.

. The learned trial judge adjudicated the dispute on merits and on the basis of available evidence came to the conclusion that the plaintiffs had proved that they

were owners of Survey No.809-A/2 and in possession of the suit property, and therefore, the defendant had no right with regard to the suit property and decree for perpetual injunction in respect of land of Survey No.809-A/2 came to be passed. The appeal was carried to the District Court. The learned Addl. District Judge after hearing both the sides and on the basis of available evidence came to the conclusion that the findings recorded by the trial court were legal and proper and dismissed the appeal. Hence the present appeal.

5. At the outset, it may be noted that there is no substantial question of law involved in this appeal. The only question sought to be raised on behalf of the appellant is with regard to the findings recorded by both the courts below to the effect that the suit is barred by res judicata contemplated under Section 11 of the Civil Procedure Code. This finding was recorded on the basis of fact that the appellant-defendant Madhukar had filed Suit bearing Civil Suit No.224 of 1962 against the present respondent Balkrishna for declaration and injunction claiming himself as owner as well as permanent tenant of Survey No.809-A/2 and in possession

of the disputed land. While deciding such issue of possession, the court found that the plaintiff Balkrishna is a owner and in possession of the suit property involved in that suit and dismissed the claim of the present appellant. The first appeal as well as second appeal against the said order came to be dismissed and directed that the present respondent was in lawful possession of the said suit property. On this factual matrix both the courts below have come to the conclusion that Section 11 of C.P.C. is required to be invoked. Moreover, on the basis of available evidence, it was held that the respondent was in possession of land Survey No.809-A/2 and the suit came to be decreed to that extent. On perusal of judgments of both the courts below, it is found that they have recorded concurrent findings on the basis of available evidence, which are seen to be properly appreciated and therefore, it would brook no interference.

6. The learned advocate for the appellant sought to put reliance on the ruling of the Apex Court in the case of **Sajjadanasinh Sayed Md. B.E.Edr. Vs. Musa Dadabhai Ummer and Ors**. reported in **AIR 2000 SC 1238**. The Apex Court has laid down the test to determine whether an

issue was directly and substantially in issue in earlier proceeding or collaterally or incidentally, is that if the issue was 'necessary' for adjudicating on the principal issue and was decided, it would have to be treated as 'directly and substantially' in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case. In my considered view, the issue of possession was directly and substantially involved in the earlier suit and therefore, both the courts below have rightly taken into account the entire legal aspect and have come to the conclusion that the suit to the extent of said land was barred by principle of res-judicata.

7. In the result no interference is called for and the appeal stands dismissed with no order as to costs.

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